

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ATLANTA BRANCH OFFICE  
DIVISION OF JUDGES

BAYOU CONCRETE COMPANY, INC.

and

Case No. 15-CA-17734

WALTER LEON THOMAS, an Individual

*Charles R. Rogers, Esq., for the General Counsel.  
Todd P. Photopulos, Esq., and Cameron L. Fisher, Esq.,  
for the Respondent.*

DECISION

Statement of the Case

**MICHAEL A. MARCIONESE, Administrative Law Judge.** Walter Leon Thomas, an Individual, initiated this case by filing the unfair labor practice charge on June 9, 2005.<sup>1</sup> Based upon this charge, a complaint issued on August 19, alleging that Bayou Concrete Company, Inc., the Respondent, violated Section 8(a)(1) and (3) of the Act by terminating Thomas on February 18 because he assisted a union, Teamsters Local 991, and because he engaged in concerted activities, and in order to discourage employees from engaging in these activities. The Respondent filed its answer to the complaint on September 2, denying the factual and legal allegations of the complaint and raising certain affirmative defenses. Specifically, the Respondent asserted that Thomas did not engage in any protected activities, that it was not aware that he did, and that his termination was for cause. The Respondent also asserted any defense it had under Section 10(b) of the Act.

I heard the case on December 1 and 2 in Mobile, Alabama. On January 20, 2006, the General Counsel and the Respondent filed briefs. Having considered the evidence and the arguments presented by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Mississippi corporation, is engaged in the production, sale and delivery of ready-mix concrete at its facility in Theodore, Alabama, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Alabama. The Respondent admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Teamsters Local 991 ("the Union") is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> All dates are in 2005 unless otherwise indicated.

## II. ALLEGED UNFAIR LABOR PRACTICES

5 The Respondent is a division of Gulf Concrete, LLC, which operates ready-mix concrete plants from Picayune, Mississippi across the Gulf Coast to Mobile, Alabama and north to Jackson, Mississippi. In February, 2005, Butch Bailess was the Respondent's Executive Vice President and Chief Operating Officer responsible for about 180 employees. His office was in Pascagoula, Mississippi. Reporting to Bailess were two Area Managers, one for Mississippi and one for Alabama. David Bosarge is the Alabama Area Manager responsible for eleven plants and 95 employees, including the Charging Party during his tenure with the company. Thomas, 10 the Charging Party, worked out of the Respondent's Theodore, Alabama plant under the supervision of Ben Deakle, Operations Manager. The Respondent has admitted that Bailess, Bosarge and Deakle were, at all times material, supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

15 Thomas was employed by the Respondent from November 1999 until he was terminated on February 18. He worked as a truck driver, driving primarily ready-mix concrete trucks to job sites in and around Mobile, Alabama. There is no dispute that Teamsters Local 991 attempted to organize the Respondent's employees in early 2003. Thomas testified that the Respondent's employees first started talking about a union in December 2002, meeting at one another's 20 houses. The first formal meeting of employees at the Union hall occurred in early January 2003. At this meeting, according to Thomas, the Union handed out hats and buttons for employees to wear. Thomas testified that he wore a Union button and Teamsters' hat to work every day until the Union's secretary-treasurer told them to stop. This coincided with the Union's withdrawal of its representation petition, about a week before a scheduled election in February 2003. Other 25 than attending meetings at employees' homes and the Union hall and wearing the Union hat and button, Thomas did not identify any other Union activity that he engaged in. There has been no overt union activity among the Respondent's employees since February 2003.

30 Deakle admitted, under questioning by the General Counsel, that the Respondent was opposed to the unionization of its employees and that the Respondent conducted a campaign to convince the employees to vote against the Union in the 2003 election. There is no dispute that, as part of its campaign, the Respondent conducted meetings with its employees in January-February 2003 at which Bailess and others spoke. Thomas testified that, at one of these meetings, he raised his hand to ask a question. According to Thomas, when he did, Bailess said 35 "you're skating on thin ice". When Thomas asked Bailess what he meant by that, Bailess pointed at Thomas and then pointed back to himself at the spot on Bailess' shirt where Thomas wore his button and to his head, where Thomas was wearing a Union hat. He did not say anything else. Thomas testified that he then sat down. He did not say whether he asked a question or what the question might have been to elicit this response from Bailess. According to 40 Thomas, Deakle, Bosarge and a woman named Lori from the office were also at this meeting in addition to about 25-30 other employees. No other employees were called by the General Counsel to corroborate Thomas' testimony.

45 Bailess testified that he conducted these meetings during the Union's campaign and that he allowed time for employees to ask questions, which he attempted to answer. Bailess testified that he had no recollection of seeing Thomas wearing a union hat or button at any of these meetings and he denied making the comment or gesture attributed to him by Thomas. According to Bailess, he would never have made such a comment because he had been advised by counsel regarding what not to say during the campaign. Although Deakle was asked 50 if he was aware that Thomas attended these meetings and answered that he was sure Thomas did, Deakle was not asked any questions about Bailess' alleged statement and gestures. Bosarge was not asked any questions about this incident.

Thomas testified that the Respondent's alleged hostility to his Union activities did not end with the withdrawal of the petition. He testified to several incidents during which Deakle made negative references to Thomas' involvement in the Union campaign. On June 19, 2003, several months after the Union withdrew the petition, Thomas received his annual performance review from Deakle. Although the review was generally favorable, with Thomas being rated as good or excellent in all but one category, Deakle wrote the following comment under "Attitude": "Tends to be untrusting and negative towards the company (but not co-workers)".<sup>2</sup> Despite this critique, Deakle rated Thomas attitude as acceptable. Thomas testified that he asked Deakle what he meant by this comment. According to Thomas, Deakle responded, "because of all that union s—t you all started, trying to get that Union. You have been causing several problems around here." When Thomas disputed this and asked Deakle if anyone had said anything about him, Deakle said no. Although Deakle denied, in response to a leading question from the Respondent's counsel, that he made the statement attributed to him by Thomas, he acknowledged that he reviewed the evaluation with Thomas, point by point. Deakle was not asked, however, what exactly he said about this negative comment, nor even whether there was any specific discussion of it. In any event, a year later, when Thomas received another performance review, his last with the company, there were no such negative comments. Although his numerical ratings were lower than those on his 2003 review, all of Deakle's written comments were positive.

Thomas testified that, on another occasion, in the summer of 2003, he encountered problems with the air brakes on his truck and pulled over to the side of the road, not far from the plant, to wait for the pressure to build back up. Deakle had apparently seen Thomas on the side of the road and had questioned the dispatcher about what Thomas was doing there. When Thomas called the dispatcher to alert him to the problem with his brakes, the dispatcher told Thomas that Deakle wanted to see him. Thomas testified that when he was able to return to the shop, he went to see Deakle. According to Thomas, Deakle asked Thomas what was his problem, why was he always trying to be sarcastic. Thomas asked what he meant by that and also asked why Deakle didn't stop to see what was going on when he saw him parked on the road. Thomas testified that Deakle then said he was "sick of [Thomas] and tired of [his] bullshit about the Union. You don't want to do what people ask you to do." Thomas told Deakle he never had any problems and that he was tired of the harassment. Thomas claims that, as he was leaving Deakle's office to go see Bailess to complain about Deakle's harassment, Deakle tried to block him. Deakle then told Thomas to go back to work. Deakle, again in response to leading questions from counsel, denied making any reference to the Union or blocking Thomas' path during this incident. However, he did not testify specifically about the incident, nor deny there was a meeting in his office as described by Thomas.

In addition to these two incidents occurring after the union campaign ended, Thomas testified about an incident in December 2002, in the early stage of the organizing drive, before any overt Union activity among the Respondent's employees. According to Thomas, he was involved in an incident at a construction site during which an employee of another contractor pulled a gun on him.<sup>3</sup> The police were called to the scene and spoke to Thomas. Deakle also came to the scene and spoke to Thomas. According to Thomas, Deakle told him that the Respondent didn't want to lose the contract on that job and that Thomas should not pursue

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<sup>2</sup> Deakle also wrote, in the section for additional supervisor's comments: "Walter is very approachable but needs to work on being more company oriented."

<sup>3</sup> Thomas' testimony regarding what led up to the other individual pulling a gun on him was vague and confusing.

charges with the police over this incident. When Thomas protested that his life was in danger and that was more serious than losing a contract, Deakle allegedly said, "I hear you're offering to start a union, why don't you get the Union to help you." Thomas claimed that Deakle also threatened that Thomas would lose his job if he pursued the matter. Despite this threat, Thomas  
 5 did go to the police precinct a couple days later to make a statement about the incident, although he did not pursue charges against the individual with the gun. Deakle confirmed that such an incident occurred but denied telling Thomas not to pursue charges with the police. He also denied, again in response to leading questions, that he made any reference to the Union in  
 10 connection with this incident. According to Deakle, he was not even aware of the Union campaign until January, 2003, when the petition was filed. Deakle testified that, contrary to Thomas' version of events, it was Thomas who elected not to pursue matters by denying that the other individual had pulled a gun on him. Deakle's testimony in this regard was somewhat corroborated by Russ Cantey, the superintendent for the other contractor on that job, who witnessed one of his employees pull a gun on Thomas but recalled that Thomas denied  
 15 anything happened when speaking to the policeman on the scene.<sup>4</sup>

Against this background of alleged hostility toward Thomas' perceived involvement with the Union, the events of February 18, which precipitated his termination, occurred. Thomas testified that he was returning to the plant that evening about 6:00 pm when he was flagged  
 20 down on the Interstate by another vehicle. When he pulled over to the side of the road, a woman in the other vehicle told him that another car had pulled into his lane and hit his truck a few miles back. Thomas admittedly was unaware of any impact between his truck and another vehicle. He drove off the highway at the next exit so he could park in a safe location. The people in the vehicle who had flagged him down followed him and repeated their claim that his truck  
 25 had been involved in an accident. When Thomas asked for their names, they told him they did not want to get involved and drove off. Thomas called the dispatcher and then called Paul (Bubba) Beeson, the Respondent's fleet manager at the Theodore plant to report this, as he had been instructed to do. He also expressed to Beeson that he was doubtful of the claim and believed they might have been trying to get the company to pay for pre-existing damage to a  
 30 vehicle. Beeson told Thomas to wait and he would call the police to see if an accident had been reported. Beeson called Thomas back and told him there was a report of an accident involving a cement truck and that the police were on the scene. Beeson told Thomas to go back to the spot where the accident allegedly occurred. Beeson's testimony regarding his communications with Thomas up to this point is consistent with Thomas' testimony.

35 Thomas testified that when he returned to the section of highway where the incident occurred, he saw a car up against the median and a policeman talking to a woman. According to Thomas, when he asked the woman what happened, she said she didn't know whether he crossed into her lane or she cut into him, she just got scared. Thomas told the officer that he  
 40 had been flagged down by another driver and that his employer told him to return to the scene. Thomas told the officer that he didn't know that he hit anybody. The police officer gave him a form to write out a statement and Thomas did this and returned it to the officer. Thomas wrote the following to describe what happened:

45 A young lady flag me down on Rangeline Rd saying a car in the right lane hit the side of my truck. I didn't hit anything. After the lady told me I call Bubba came back to I-65 to the scene.

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<sup>4</sup> Cantey's testimony regarding what Thomas told the police officer was hearsay.

Thomas testified further that, while he was at the scene, Bubba Beeson and a man from Safety Plus arrived. Safety Plus is a contractor used by the Respondent to investigate accidents and administer its safety program. Beeson and the Safety Plus employee gave Thomas a drug test, as required by D.O.T. regulations, and inspected the truck. According to Thomas, there were no marks or other damage to his truck that would indicate it had been involved in a collision. Thomas testified that, to the contrary, the truck had recently been painted and the bumper looked like it was brand new. Thomas claimed that the officer, Beeson and the Safety Plus employee also said that they could not see any damage to the truck. Thomas testified that he also saw no damage to the driver's side of the other vehicle. The only damage he saw was on the passenger side where the car hit the median. Thomas testified further that, after investigating the accident, the police officer told him, Beeson and the Safety Plus employee that he could not determine fault. He released them to take the truck back to the shop and did not issue any citations to Thomas.

Thomas testified further that, when they returned to the shop, he, Beeson and the Safety Plus employees looked at the truck and still did not see any damage or other marks indicating it had been in an accident. Thomas testified further that no one took pictures of the truck in his presence, either at the scene or in the shop. Thomas testified that he wrote out another statement, at the request of the Safety Plus investigator, and went home. The statement he wrote at the shop is as follows:

Lady stop me on Rangeline and told me a car hit the side of my truck (I ask for her name she pull off) I call Bubba, then went back to the area. A police officer was there. Also a dark color car was there, with damage, no injury of my knowledge. When I arrive two ladies was talking to the police officer. A young [lady] said I hit the back of her car with my bumper. I know I didn't hit her car because I would have felt the impact of her car. She was in the far right hand lane next to the ditch & I was next to the far right hand lane & she end up in the center media area, with no other car been damage with a lot of traffic. I look at my truck, there was no damages or marks showing that I hit anything.

Thomas testified that he was told what to write in the statement by the Safety Plus investigator. On cross-examination, Thomas also said that, had he hit Stingley's car, he would have felt the impact and there would have been injuries.

Thomas' testimony about what happened at the scene of the accident was contradicted by other witnesses. Demetriace Stingley, the woman driving the other vehicle involved, testified that, as she was driving in the right lane of the Interstate with her two-year old child in the backseat, she felt something hit the back of her car just after her daughter said, "big truck, big truck". Her car then fishtailed, hit the truck again, at which point Stingley saw it was a concrete truck, then spun around across three lanes of traffic before coming to rest against the center median with the back end of her car sticking out in traffic. Stingley testified further that she could hear the truck scraping the side of her car. Neither Stingley nor her daughter was hurt. She claimed that the truck that hit her took off and returned two hours later, while she was talking to the police officer at the scene of the accident. Stingley testified that Thomas, whom she identified at the hearing as the driver of the truck that hit her, said a woman had flagged him down on Rangeline Road and said a car had hit him. According to Stingley, Thomas denied that he hit her. She also claimed that he appeared non-chalant and unconcerned. Stingley described the damage to her car, which was extensive on the driver's side, but said she could not see

whether there was any damage to the truck because it was parked on the side of the road.<sup>5</sup> Stingley also wrote out a witness statement for the officer in which she described what happened as follows:

5 I was heading south toward Tillman's corner @ 70 mph when I was hit from behind twice by a concrete truck. I spun around from the far right lane into the median on the far left.

10 Officer Charles Simmons, from the Mobile Police Department's traffic unit, testified for the General Counsel. He was the investigating officer at the scene. He identified the accident report he completed as part of his investigation which included the two witness' statements completed by Stingley and Thomas. He testified that there were no other witnesses. Simmons testified, as he had indicated in the report, that he was unable to determine fault other than that one of the two drivers had made an improper lane change which caused the impact. His written  
15 description of the accident is as follows:

[Vehicle] # 1 and # 2 were south bound I-65 approaching I-10 interchange.  
Unknown unit changing lanes struck the other causing accident. # 1 vehicle  
[Stingley's car] continued after contact striking concrete barrier. After police arrived  
20 on the scene concrete truck returned to accident location from Rangeline Rd. area after being flagged down by unknown eye witness to accident.

Simmons testified that, until Thomas returned to the scene, he was not even sure if Stingley's vehicle had been hit by another or if she just lost control of her car. However, once he  
25 inspected the vehicles, Simmons was certain there had been impact between the truck and the car.<sup>6</sup> In his report, Simmons noted on a diagram of the car and the truck where he observed damage. Again, contrary to Thomas, he noted damage to the front of Thomas' truck. He also noted, contrary to Thomas' testimony and consistent with that of Stingley, that there was damage to the driver's side of her car. Officer Simmons confirmed that he did not check the box  
30 on the accident report that would indicate Thomas had left the scene of the accident. He also confirmed that he issued no citations to Thomas or Stingley as a result of his investigation.

Beeson and Gary Blake, who was the Safety Plus investigator who went to the scene of the accident on February 18, testified that they inspected Thomas' truck while it was parked by  
35 the side of the road. Contrary to Thomas, they claimed that the bumper did not look like it was freshly painted but instead had evidence of a collision, i.e. scrapes and different colored paint where it allegedly hit the other vehicle.<sup>7</sup> Blake and Beeson acknowledged they were unable to inspect Stingley's car at the scene because it was already on the lift truck, ready to be transported to the wrecker's yard, when they arrived. Beeson and Blake also testified that they  
40 took pictures of the truck the night of the accident to document the condition of the bumper. Those pictures, which are in evidence, contradict Thomas' testimony about the condition of the

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<sup>5</sup> Stingley acknowledged on cross-examination by the General Counsel that she had settled her case against the Respondent. She was not asked the amount she received in the  
45 settlement.

<sup>6</sup> Officer Simmons testified that he inspected the truck as it was parked by the side of the road. He was unable to fully inspect Stingley's car at the scene because of its location in the roadway but he did immediately go to the wrecker's yard where her vehicle was towed and confirmed the damage as reported on his report.

<sup>7</sup> It is undisputed that the damage to Thomas' truck was minimal and did not need to be repaired.  
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bumper. In addition, the Respondent placed in evidence an invoice showing that it last had Thomas' truck painted in September 2003, more than 16 months before the accident. Blake, while confirming that he had Thomas write out a statement at the shop that night, denied that he told Thomas what to write. Beeson, who testified that he observed Thomas talking to Blake and writing his statement at the shop, also denied hearing Blake tell Thomas what to write.

Blake and Beeson also testified that they ultimately inspected Stingley's vehicle for damage when they were able to get into the wrecker's yard on Monday morning, February 21. They also encountered Stingley there, who was retrieving her personal belongings from the car. Both Blake and Beeson testified consistently regarding the condition of the vehicle. In addition, the Respondent offered photographs taken that morning by Blake to document the damage for insurance purposes. In addition to the photographs, Blake also took measurements of the damage in order to see if they matched up to the bumper and bolts on Thomas' truck that had signs of impact with another vehicle. When Beeson and Blake returned to the Respondent's shop later that morning, they took similar measurements and additional photographs of Thomas' truck to compare with the damage on Stingley's car. Blake testified that the measurements added up to there having been impact between the truck and car as described by Stingley. Blake's testimony was consistent with that of Officer Simmons that, after inspecting Stingley's car at the wrecker's yard on Friday night, he was satisfied beyond a reasonable doubt that there had been a collision between the two vehicles.<sup>8</sup>

Thomas testified that he was on the call-in list to work the day after the accident, Saturday, February 19. When Thomas reported to the shop, he was told by the dispatcher that he couldn't work until the results of his drug test came back. The dispatcher told Thomas to call on Monday. According to Thomas, he called Deakle on Monday and was told that the drug test results had not come back yet and to call the next day. On Tuesday when he called Deakle, Thomas was told that the drug test was positive. Thomas told Deakle he didn't believe that. Deakle then said that regardless of the drug test, the Respondent didn't want Thomas to work there anymore. According to Thomas, he then asked Deakle if there was anything he could do to keep his job, even offering to pay for any damage to the other vehicle. Deakle asked why Thomas would pay for something he didn't do, to which Thomas replied that he wanted to keep his job. At that point, Deakle told Thomas that he didn't want him there because Thomas tried to start a union, that he was stealing concrete and causing troubles. Thomas denied to Deakle that he had been stealing concrete or causing trouble and asked Deakle who he needed to talk to keep his job. Deakle told Thomas he could talk to Bosarge.

Thomas testified that he called Bosarge after his conversation with Deakle and met with Bosarge in his office on Wednesday, February 23. According to Thomas, Bosarge said he didn't want to go against Deakle, that Deakle knew what he was doing. Thomas told Bosarge he didn't have to go against Deakle, that all Thomas wanted was a fair shake. He told Bosarge that the police report showed he was not at fault. According to Thomas, by the time he met with Bosarge, he had gotten a copy of the police report and he showed it to Bosarge. Thomas also told Bosarge that he had been with the Respondent a long time, that he always did whatever they asked of him. Thomas testified that, after he finished pleading his case, Bosarge said, "but they say you tried to start a union, that you caused confusion with employees and are hard to get along with." Thomas responded by telling Bosarge that this wasn't true and that he had received no discipline. Bosarge ended the meeting by telling Thomas that he would not go

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<sup>8</sup> As noted, Simmons did not issue any citations upon the conclusion of his investigation because he was still unable to determine which vehicle made the improper lane change which caused the accident.

against Deakle and suggesting that Thomas talk to Bailess.

When testifying about his meeting with Bosarge, Thomas interjected that he had also shown Deakle the police report that he showed to Bosarge. Thomas claimed that he showed Deakle the police report, purportedly absolving him of responsibility for the accident, on Monday afternoon, February 21, around 5:00 pm. This was allegedly after he had spoken to Deakle on the phone and been told to call back the next day. According to Thomas, when he showed Deakle the police report on Monday, Deakle said “get the Union to help you.” On cross-examination, the Respondent established that Thomas made no mention of this conversation with Deakle in his pre-trial affidavit. The statement Deakle allegedly made about the Union was also omitted from another statement Thomas wrote and submitted to the Board with his charge.

Thomas testified further that, as suggested by Bosarge, he contacted Bailess to appeal Deakle’s decision. He called Bailess at his office in Pascagoula and asked to meet with him. Bailess allegedly told Thomas that he could not meet with him until the following Monday, February 28. According to Thomas, he went to the shop on Friday, February 25, after being told by other employees that Bailess was there. Thomas testified that he saw Bailess’ truck parked there so he called Bailess as he was standing next to Bailess’ truck in the parking lot. When he asked Bailess where he was, Bailess said he was in Jackson. Thomas then told Bailess that he was standing by his truck and Bailess replied, “I ain’t got time for this s—t. I told you I’d talk to you on Monday.” When Thomas met with Bailess the following Monday, he again pleaded his case, pointing to his good record and the police report showing he was not at fault. Thomas again offered to pay for any damage even though he still denied he had been involved in an accident. When Bailess asked why he would pay for something that wasn’t his fault, Thomas told him that he would do anything to keep his job. Bailess told Thomas that he was going to stick with Deakle’s decision because Deakle told Bailess Thomas had left the scene of an accident. When Thomas replied that he had not been cited by the police for leaving the scene, Bailess then brought up the Union and said Thomas had been accused of stealing concrete and that he did not get along with his co-workers. Thomas told Bailess that he was not the one who tried to bring in a union. He asked Bailess to look at his reviews and told Bailess that he caused no trouble. According to Thomas, Bailess then told him that he was costing the company a lot of money. When Thomas asked what Bailess meant by this, Bailess allegedly replied that it cost the Respondent money to fight the Union and that Thomas had been involved in an accident that cost the company money. Bailess ended the meeting by telling Thomas that he would not reverse Deakle’s decision.

Deakle, Bosarge and Bailess all testified for the Respondent and contradicted Thomas’ version of these meetings.<sup>9</sup> Deakle denied that he told Thomas on February 22 that his drug test was positive. In fact, as stipulated by the parties, Thomas had a negative drug test. According to Deakle, the only time he mentioned the drug test in conversation with Thomas was on Saturday, the morning after the accident, when he told Thomas that he could not come back to work until the Respondent got the results of the test. Because the Respondent had already made a decision to terminate Thomas by the time the results came back, Deakle never had reason to discuss the results with Thomas. Deakle also denied ever mentioning the Union in connection with Thomas’ termination. According to Deakle, he was not even aware that Thomas was involved in the Union organizing drive. Deakle testified that he made the decision to terminate Thomas solely based on the accident on February 18 and Thomas’ response to it. According to Deakle, after Beeson and Blake completed their investigation of the accident on

<sup>9</sup> Most of the denials were elicited through leading questions by the Respondent’s counsel, asking the witness to specifically deny the statements attributed to them by Thomas.



Monday, February 21, they recommended that Thomas be fired. He reviewed the information they had gathered, as noted above, and concluded that Thomas was either so unaware of what was going on at the time of the accident that he didn't know he had hit another vehicle with enough force to cause it to spin across three lanes of traffic, or he knew he had an accident and drove off. Either way, according to Deakle, he could no longer safely employ Thomas as a driver of the Respondent's vehicles.

Bosarge recalled meeting with Thomas about his termination, at Thomas' request, but he did not recall the date. Bosarge testified that the meeting was brief, with Thomas asking him if he supported Deakle's decision and his telling Thomas that, based on what he reviewed, he did. Bosarge denied making any reference to Thomas being a troublemaker or involved with the Union during his meeting with Thomas. According to Bosarge, the Union did not come up in the conversation, not even being raised by Thomas. Bosarge also denied mentioning anything about Thomas stealing concrete.

Bailess denied any recollection of having a conversation with Thomas on Friday, February 25, regarding whether he was at the Respondent's Theodore facility or not, and he specifically denied saying to Thomas that he "didn't have time for this s—t." Bailess did recall Thomas calling him within a week of his termination to ask for a meeting. According to Bailess, he met with Thomas at the Theodore facility within a couple days of this call. After hearing Thomas version of events and reviewing his file and the accident report, he told Thomas he would review the decision further and get back to him. After meeting with Thomas, he met with Deakle, Beeson and Blake and reviewed the results of their investigation. According to Bailess, all three men offered the same opinion, i.e. either Thomas had an accident and left the scene, or he was not even aware he had an accident. In either case, the Respondent would not be in a good position having such a driver on the road with the type of heavy equipment the Respondent used to deliver concrete to its customers. Bailess testified further that all three men expressed no doubt that Thomas should have been aware that he had an accident because of the nature of the damage to the vehicles. Bailess denied that there was any mention of the Union during his conversation with Deakle, Beeson and Blake. Bailess also denied that the subject of the Union came up in his conversation with Thomas. After meeting with Deakle, Beeson and Blake, Bailess agreed with the decision to terminate Thomas and he communicated that decision to Thomas. Bailess denied that any union activity Thomas may have engaged in played any role in his decision.

As noted above, Thomas claimed that Deakle and Bailess accused him of stealing concrete during their discussion of his termination in February. On cross-examination by the Respondent's counsel, Thomas explained that this accusation, which Thomas had also mentioned in a statement he submitted with his unfair labor practice charge, referred to an incident the previous summer, in 2004, when Deakle suspended him pending an investigation into whether Thomas had stolen concrete and caused damage to a woman's fence. Thomas testified that Deakle told him the woman claimed that Thomas had given her his number to call about the damage. According to Thomas, after he threatened to go over Deakle's head, Deakle reinstated him with pay for the three days he was out of work.<sup>10</sup> Deakle also testified about this incident during his direct examination. According to Deakle, this incident occurred in July 2003 when a woman called the Respondent's office complaining that one of its cement trucks knocked down her fence while pouring concrete at a neighbor's house. The woman said that the driver of the truck gave her son a piece of paper on which the driver had written "call Walter

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<sup>10</sup> Thomas complained that he was not reimbursed for overtime opportunities he missed while on suspension.

about the fence” with the cell-phone number belonging to Thomas. Deakle testified that the Respondent had no scheduled deliveries to the woman’s neighbor. When he spoke to Thomas and another employee about the woman’s complaint, they suggested another individual named Walter, who did not work for the Respondent, may have been involved. Deakle acknowledged  
 5 suspending Thomas while he investigated to determine if the Respondent and Thomas had been involved in this incident. Because he was unable to establish that Thomas was involved, Deakle reinstated him with pay and took no further action against him. The Respondent made no claim in this proceeding that this incident had anything to do with its decision to terminate Thomas.

10 The General Counsel attempted to show, during his cross-examination of Bailess and Deakle, that the Respondent had not terminated other drivers who were involved in motor vehicle accidents causing injuries and/or property damage. Bailess admitted that the Respondent had no policy requiring that a driver be terminated if involved in an accident.  
 15 According to Bailess, the Respondent will make a decision whether to issue discipline for an accident after investigating the accident and considering a number of factors, including whether the driver was at fault, whether he was properly carrying out his duties, whether he reported the accident, and so forth. According to Bailess, the key factor in Thomas’ termination was the fact he either left the scene of a serious accident or was oblivious to the fact that such an accident  
 20 had occurred. Bailess testified that the Respondent had never had a driver involved in such a situation before. Deakle testified similarly to Bailess, indicating that the decision whether to terminate an employee is left to his discretion based on the facts of the case and that termination is not automatic. Deakle also testified that he was unaware of any other driver being in an accident with one of the Respondent’s trucks and either not being aware he had an  
 25 accident or leaving the scene knowing he had an accident. The General Counsel, during his examination of the Respondent’s witnesses, was unable to uncover any similarly situated employee who was treated differently.

30 The sole issue in this case is whether the Respondent, in terminating Thomas on February 21, was motivated by any union or protected concerted activity engaged in by Thomas. In *Wright Line*,<sup>11</sup> the Board held that, in cases where employer motivation is the issue, the General Counsel must first establish, by a preponderance of the evidence, that union or protected concerted activity was a “motivating factor” in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was  
 35 engaged in protected activity, that the employer was aware of this activity, and that the employer exhibited animus against such activity. See also *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Only if the General Counsel has made the requisite showing will the burden shift to the Respondent to “demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the  
 40 absence of the protected conduct.” *Wright Line*, 251 NLRB supra, at 1089. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Where an employer asserts, as here, that some type of employee misconduct was the reason for discharge, the employer “does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the  
 45 employer acted on that belief in taking the adverse action against the employee.” *Midnight Rose Hotel & Casino*, 343 NLRB No. 107 (December 16, 2004).

The General Counsel relies upon the uncorroborated testimony of the Charging Party to

50 <sup>11</sup> 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S.989 (1982).

prove union activity, knowledge and animus. The Respondent's witnesses, while admitting knowledge of union activity generally in early 2003, have denied any specific knowledge of Thomas' involvement in that activity. Similarly, although Deakle admitted that the Respondent was opposed to the unionization of the Respondent's employees, he and the other witnesses called by the Respondent have denied the specific instances of anti-union animus directed toward Thomas to which he testified. Thus, General Counsel's prima facie case rests almost exclusively on the credibility of the Charging Party. Thomas' testimony about his union activity in 2003 and the Respondent's reaction to it, while not patently unbelievable, does not withstand close scrutiny. Thomas testified to only minimal Union activity yet his testimony would suggest that the Respondent believed he was a key figure in the organizing campaign. There is no evidence in the record that would lead one to believe that the Respondent would have formed such a belief. Certainly, Thomas never described any incidents that would have led the Respondent to perceive him to be such a threat. Even assuming the Respondent did believe Thomas was a leader in the Union's 2003 campaign, there is no evidence of any Union activity after February 2003 that would have caused the Respondent to be concerned about Thomas' union activity in 2005 when the decision was made to terminate him. If Thomas' testimony is to be believed, I would have to find that the Respondent's managers harbored such hostility to Thomas' minimal union activity that it waited two years for an opportunity to fire him, and then seized on the events of February 18 to eliminate a union supporter when there was not even a hint of union activity among its employees. This is a stretch I am not prepared to make.

I do not doubt that Thomas wore a union button and hat to work during the union campaign in January and February 2003. It is likely that at least someone in management saw him wearing this Union insignia. I do not credit Thomas' testimony, however, that Bailless pointed to his hat and button at a meeting and said that Thomas was "on thin ice" when he attempted to ask a question. This uncorroborated testimony just doesn't make sense. Thomas provided no basis for explaining why Bailless would have reacted so negatively to Thomas at this meeting. Because there were no other witnesses called who could have corroborated this testimony, I shall not credit it. I do credit Thomas' testimony that Deakle, when discussing Thomas' 2003 performance review with him in June of that year, linked Thomas' union activity to the negative comment he wrote about Thomas' attitude in that review. Although Deakle denied making this statement, his failure to testify as to what he did say about the negative comment leads me to believe Thomas' version of this conversation.<sup>12</sup> However, whatever animus is revealed through this comment had apparently disappeared by the time Thomas received his next evaluation, in June 2004, because all of Deakle's comments on that review are highly favorable. Deakle even wrote in June 2004 that Thomas had a good attitude. Similarly, even if, as Thomas testified, Deakle made negative comments to him about the Union in connection with the gun incident in December 2002 and the incident when he was parked by the side of the road, in the summer of 2003, these events occurred long before the decision was made to terminate him.<sup>13</sup> Other than Thomas' testimony that Deakle, Bosarge and Bailless referred to his Union activity at the time of his termination, there is no evidence of anti-union animus between the mid-2003 and the February 18 accident. Under these circumstances, I can not believe that the Respondent's supervisors would have brought up the Union in February

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<sup>12</sup> Deakle testified that he discussed this review with Thomas, point by point. By his own testimony then, he said something about the negative evaluation of Thomas' attitude. In the absence of testimony regarding what he did say, I feel constrained to credit Thomas' version.

<sup>13</sup> Thomas' testimony about these incidents was hard to believe because the alleged references to the Union seem to come out of nowhere. There is nothing in the record to suggest that Respondent would have believed Thomas was the individual who tried to bring the Union in.

2005. All of the evidence in the record indicates that the Union was no longer an issue and there would be no reason for the Respondent to harbor anti-union animus toward Thomas so long after the campaign. Thus I do not credit Thomas' testimony as to these conversations.

5           Based on these credibility resolutions, I find that the General Counsel has failed to meet his burden of proving that Thomas' union activity in early 2003 was a motivating factor in the February 2005 decision to terminate him. Whatever animus the Respondent bore against the Union, or Thomas in particular, had long since dissipated by the time Thomas was involved in the accident with Ms. Stingley on February 18. It was that event that precipitated the termination and not any union activity that occurred two years earlier.

10           Moreover, even had the General Counsel made out a prima facie case of anti-union motivation, I would find that the Respondent satisfied its burden under *Wright Line*, supra, of proving that it would have taken the same action even absent union activity. Thus, it is not  
15           necessary to determine whether Thomas in fact hit Ms. Stingley's car, or caused the extensive damage revealed by the photographs. Nor is it necessary to find that Thomas in fact was at fault or left the scene of the accident. The issue, under *Wright Line*, supra, is whether the  
20           Respondent reasonably and honestly believed he did and whether it would have taken the same action based on this belief in the absence of union activity. The evidence here establishes that the Respondent, through its safety and risk management consultant, conducted an investigation of the accident, taking photographs and measurements and statements from witnesses, before making the determination to terminate Thomas. While I am not an accident investigator, there is no reason to disbelieve the testimony of Blake, the safety expert, regarding his findings. The  
25           photographs in evidence do show damage consistent with an accident as described by Stingley. Even the police officer who investigated the accident was satisfied beyond a reasonable doubt that Thomas' truck hit Ms. Stingley's car and caused it to spin and hit the median. In the face of this evidence, Thomas testimony that there was no sign of an accident on his truck and that Ms. Stingley's car had no damage on the driver's side is patently incredible. I thus find that the  
30           Respondent had a reasonable basis for believing that Thomas had been involved in an accident on the night of February 18 that caused substantial damage to Ms. Stingley's car.

          While it is undisputed that the mere fact Thomas had been involved in an accident would not necessarily lead to his termination, the Respondent based its decision on more than the fact of the accident. Deakle credibly testified that it was Thomas' reaction to the accident that  
35           caused concern and led to his termination. The evidence in the record here supports Deakle's testimony that either Thomas was so oblivious to what was happening that he was unaware he had struck Stingley's car, or he kept driving knowing he did. I believe Deakle that, under either circumstance, the Respondent would be at risk keeping such a driver in its employ. Deakle's  
40           testimony was supported by objective evidence as well as the testimony of the police officer who investigated the accident and Blake, the safety consultant. In the face of this overwhelming testimony, Thomas continued to insist at the hearing that he did not hit Stingley's car. In order to believe Thomas' testimony, I would have to find that someone drove Thomas' truck into Stingley's car between the time it was towed to the wrecker's yard and Monday morning when the photos were taken. There simply is nothing in the record that would support the existence of  
45           such a conspiracy to bring about the termination of an employee with minimal union activity that was two years old!

          Based on the above and the record as a whole, I find that the Respondent did not terminate Walter Leon Thomas on February 21, 2005 because he had engaged in union or  
50           other protected concerted activities. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

By discharging Walter Leon Thomas on February 21, 2005, the Respondent has not engaged in any unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) or any other provision of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 23, 2006.

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Michael A. Marcionese  
Administrative Law Judge

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.